Mayland Valiant Sdn Bhd v Majlis Perbandaran Subang Jaya

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-1307–07 OF 2016
DAVID WONG, ABANG ISKANDAR AND HASNAH HASHIM JJCA
24 APRIL 2018

Local Government — Town planning — Application for planning permission — Granting of — Validity of planning permission — Sale of hotel suites building as hotel apartments — Whether contrary to planning permission — Appeal against decision of High Court — Town and Country Planning Act 1976 ss 18, 19 & 20

The appellant ('the defendant') was a property developer formerly known as Valiant Wealth Sdn Bhd. The shareholders of the defendant were Malaysian Land Properties Sdn Bhd. Malaysia Land Properties Sdn Bhd submitted an application for planning permission on lands known as Lot 4244 and 4245 ('the said lots') ('the first application') to the respondent ('the plaintiff') for the proposed development of the said lots which included, among others, five blocks of 23 storey commercial serviced apartments and one block of 23 storey commercial serviced apartments connecting to a hotel building known as Grand Dorsett Hotel located on the said lots. The first application was refused by the plaintiff, inter alia, on the ground that the number of car parking bays provided was insufficient. Subsequently, Valiant Wealth Sdn Bhd submitted an application for planning permission for a proposed development on the said lots ('the second application') which was also refused. The defendant then submitted for a planning permission ('the third application') towards part of the existing Grand Dorsett Hotel building. The plaintiff considered the third application under s 22(3) of the Town and Country Planning Act 1976 ('the TCPA') and decided to grant planning permission to the defendant. The plaintiff processed the third application as a non-strata title hotel on the basis that the defendant did not intend to sell the Hotel Suites. The defendant then applied to the Ministry for a Housing Developer license and an advertisement for sale permit respectively. The Controller of Housing, National Housing Department, Ministry of Housing and Local Government issued a Housing Developer license and an advertisement for sale permit for the purpose of selling the units. The defendant sold the units in the hotel suites building as hotel apartments contrary to the plaintiff's planning permission. The plaintiff's claim was essentially on the sale of the hotel suites proposed on the said lots and the validity of the planning permission, building plan and notice of commencement/continuation of work. The defendant averred that they were not required under any of the planning Acts, Regulations or guidelines to declare to the plaintiff that the hotel suites in the project would be sold. In that

regard, the plaintiff had no powers to direct or impose conditions on the defendant on the sale of the hotel suites as the matters concerning the sale of the development fell under the purview of the Ministry of Urban Well being, Housing and Local Government ('MHLG'); not the local authority. Hence, the defendant counter claimed against the plaintiff. The High Court allowed the plaintiff's claim and dismissed the defendant's counterclaim. Hence the present appeal by the defendant.

Held, allowing the appeal with costs:

(1) Despite filing this action, the plaintiff did not issue a stop work order to the defendant. Furthermore, they did not revoke the planning permission or the building plan for the project or for the construction of the show gallery and sales office. The plaintiff also did not issue any order to demolish the works already completed. The conduct of the plaintiff smacked bad faith and ill intent (see para 78).

(2) There was no evidence of any concealment of any material facts by the defendant. The defendant had stated in its proposed development paper that it planned to construct 1989 hotel suites. The plaintiff had every opportunity to raise any queries with regard to the hotel suites, especially so with the distinct sizable number of hotel suites to be constructed. This, the plaintiff omitted to do. The fact that there was no objection by the members of the OSC, at any stage, showed that due consideration was given (see para 79).

(3) The judicial commissioner erred in law and in fact when she concluded that the sale of the hotel suites was contrary to the planning permission. In granting the approval of the building plan, the plaintiff, through the OSC, had taken into account all the relevant factors in relation to the approval of the building plan within the framework of the relevant legislation. Based on the contemporaneous evidence, the plaintiff, through the OSC, had arduously scrutinised and considered the third application. The plaintiff had not mistakenly approved the building plan (see para 82).

(4) There was continuous communication between the plaintiff and the defendant throught the planning permission and the approval of the building plan. The defendant had acted upon the approval of the building plan and submitted the notice of commencement of works. In fact, the plaintiff had completed the works in relation to the refurbishment of the swimming pool. The JC erred in failing to appreciate the sufficient available evidence in particular regarding the process and procedure of the approval of the building plan in accordance with the relevant legislations (see para 86).

(5) The defendant had a valid planning permission and the building plan was not ultra vires nor invalid or unlawful and of no legal effect. The plaintiff was estopped from contending that the planning permission had expired and that the subsequent building plan approval by the plaintiff and the notice of commencement of building work submitted by the defendant was void, invalid and of no legal effect (see para 88).

(6) The doctrine of legitimate expectation is couched in equity and subject to the relevant equitable doctrines. The evidence showed that the defendant had relied on the representation of the plaintiff and had obediently and diligently complied and fulfilled the conditions imposed by the plaintiff (see para 97).

[Bahasa Malaysia summary

Perayu ('defendan') adalah pemaju hartanah yang dahulunya dikenali sebagai Valiant Wealth Sdn Bhd. Pemegang saham defendan adalah Malaysian Land Properties Sdn Bhd. Malaysia Land Properties Sdn Bhd telah mengemukakan permohonan untuk kebenaran merancang tanah yang dikenali sebagai Lot 4244 dan 4245 ('lot tersebut') ('permohonan pertama') kepada responden ('plaintif') bagi pembangunan yang dicadangkan bagi lot tersebut yang termasuk, antara lain, lima blok pangsapuri perkhidmatan komersial setinggi 23 tingkat dan satu blok 23 tingkat pangsapuri perkhidmatan komersial yang menghubungkan ke bangunan hotel yang dikenali sebagai Grand Dorsett Hotel yang terletak di lot tersebut. Permohonan pertama ditolak oleh plaintif, antara lain, dengan alasan bahawa jumlah tempat letak kereta yang disediakan tidak mencukupi. Selepas itu, Valiant Wealth Sdn Bhd telah mengemukakan permohonan untuk kebenaran merancang pembangunan yang dicadangkan bagi lot tersebut ('permohonan kedua'), yang juga ditolak. Defendan kemudian mengemukakan kebenaran perancangan ('permohonan ketiga') ke arah sebahagian bangunan hotel Grand Dorsett yang sedia terbina. Plaintif mempertimbangkan permohonan ketiga bawah s 22(3) Akta Perancangan Bandar dan Wilayah 1976 ('TCPA') dan memutuskan untuk memberi kebenaran merancang kepada defendan. Plaintif memproses permohonan ketiga sebagai hotel hak milik bukan strata atas dasar defendan tidak berniat menjual Hotel Suites. Defendan kemudian memohon kepada Kementerian untuk mendapatkan lesen Pemaju Perumahan dan permit iklan jualan. Pengawal Perumahan, Jabatan Perumahan Negara, Kementerian Perumahan dan Kerajaan Tempatan telah mengeluarkan lesen Pemaju Perumahan dan permit jualan bagi tujuan jualan unit. Defendan menjual unit-unit di bangunan hotel suite sebagai hotel pangsapuri, bertentangan dengan kebenaran perancangan plaintif. Tuntutan plaintif asasnya adalah bagi jualan suite hotel yang dicadangkan pada lot tersebut dan kesahihan kebenaran merancang, pelan bangunan dan notis pemulaan/kesinambungan kerja. Defendan menyatakan bahawa mereka tidak dikehendaki di bawah mana-mana perancangan Akta, peraturan atau garis panduan untuk

mengisytiharkan kepada plaintif bahawa hotel suite dalam projek tersebut akan dijual. Sehubungan itu, plaintif tidak mempunyai kuasa mengarahkan atau mengenakan syarat-syarat atas defendan berkenaan jualan hotel suite kerana perkara-perkara tentang jualan pembangunan jatuh di bawah bidang kuasa Kementerian Bandaraya, Perumahan dan Kerajaan Tempatan ('MHLG'); bukan pihak berkuasa tempatan. Oleh itu, defendan menuntut balas terhadap plaintif. Mahkamah Tinggi membenarkan tuntutan plaintif dan menolak tuntutan balas defendan. Oleh itu rayuan ini oleh defendan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Walaupun memfailkan tindakan ini, plaintif tidak mengeluarkan perintah pemberhentian kerja terhadap defendan. Tambahan lagi, mereka tidak membatalkan kebenaran merancang atau pelan bangunan untuk projek itu atau untuk pembinaan galeri pameran dan pejabat jualan. Plaintif juga tidak mengeluarkan apa-apa perintah untuk merobohkan kerja-kerja yang telah selesai. Tindakan plaintif berbaur niat jahat dan buruk (lihat perenggan 78).

(2) Tidak ada keterangan tentang penyembunyian fakta material oleh defendan. Defendan telah menyatakan dalam kertas rancangan yang dicadangkan untuk merancang 1989 hotel suite. Plaintif mempunyai setiap peluang untuk mengemukakan apa-apa pertanyaan berhubung dengan hotel suite, terutamanya dengan beberapa hotel suite yang hendak dibina. Ini gagal dilakukan oleh plaintif. Fakta bahawa tidak ada bantahan oleh ahli-ahli OSC, di mana-mana peringkat, menunjukkan bahawa pertimbangan yang sewajarnya telah diberikan (lihat perenggan 79).

(3) Pesuruhjaya kehakiman terkhilaf dalam undang-undang dan fakta apabila beliau menyimpulkan bahawa jualan hotel suite bertentangan dengan kebenaran perancangan. Dalam memberikan kelulusan pelan bangunan, plaintif, menerusi OSC, telah mengambil kira semua faktor berkaitan dengan kelulusan pelan bangunan dalam rangka undang-undang yang berkaitan. Berdasarkan bukti semasa, plaintif, melalui OSC, telah meneliti dengan teliti dan mempertimbangkan permohonan ketiga. Plaintif tidak tersilap meluluskan pelan bangunan (lihat perenggan 82).

(4) Terdapat komunikasi berterusan antara plaintif dan defendan melalui kebenaran merancang dan kelulusan pelan bangunan. Defendan telah bertindak atas kelulusan pelan bangunan dan menyerahkan notis pemulaan kerja. Malah, plaintif telah menyiapkan kerja-kerja pembaikan kolam renang. Persuruhjaya Kehakiman terkhilaf apabila gagal mempertimbangkan keterangan sedia ada khususnya mengenai proses dan prosedur kelulusan pelan bangunan mengikut undang-undang yang berkaitan (lihat perenggan 86).

(5) Defendan memiliki permohonan perancangan yang sah dan pelan bangunan tersebut bukanlah ultra vires atau tidak sah atau menyalahi undang-undang dan tiada kesan undang-undang. Plaintif diestop daripada menghujahkan bahawa kebenaran perancangan telah tamat tempoh dan bahawa pelan bangunan berikutnya yang diluluskan oleh plaintif dan notis permulaan kerja pembinaan yang dikemukakan oleh defendan adalah tidak sah, terbatal dan tiada kesan undang-undang (lihat perenggan 88).

(6) Doktrin jangkaan sah berasaskan ekuiti dan tertakluk pada doktrin berekuiti. Keterangan menunjukkan defendan bergantung pada perwakilan plaintif dan telah patuh dan tekun mematuhi dan memenuhi syarat-syarat yang dikenakan oleh plaintif (lihat perenggan 97).]

Notes

For cases on application for planning permission, see 10(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 219–230.

Cases referred to

A-G of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629, PC (refd)

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223, CA (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Government of The State of Negeri Sembilan & Anor v Yap Chong Lan & 12 Ors [1984] 2 MLJ 123; [1984] 2 CLJ 150; [1984] 1 CLJ Rep 144, FC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1; [1999] 3 CLJ 65, FC (refd)

Legislation referred to

Housing Development (Control and Licensing) Regulations 1989

Local Government Act 1976 ss 3, 8

Strata Titles Act 1985

Street, Drainage and Building Act 1974 ss 70(1), (9), 79(9), 80, 133

Town and Country Planning Act 1976 ss 5, 6, 19, 19(1), 21(1), (6), 22, 22(3), (4), (6), 24, 24(1), (3), (5)

Uniform Building By-Laws 1984

Appeal from: Civil Suit No 21NCVC-160–09 of 2012 (High Court, Shah Alam)

Gopal Sri Ram (Rajinder Singh Veriah, Annel Raj, David Yii and Damien Chan

with him) (Shearn and Delamore) for the appelant.
Karin Lim Ai Ching (Murugan a/l D Maniam and Cyrus Lim with her) (Presgrave & Matthews) for the respondent.

Hasnah Hashim JCA (delivering judgment of the court):

[1] This is an appeal by the appelant (the defendant in the High Court) against the decision of the High Court dated 29 June 2016 after a full trial, which allowed the plaintiff's claim against the defendant and dismissed the defendant's counterclaim with costs of RM120,000.

[2] We heard this appeal on 13 December 2017 and reserved our decision. After perusing the records of appeal, the written submissions filed by the respective learned counsel and upon hearing learned counsel, we adjourned the matter for our consideration and decision.

[3] We now give our decision and the reasons for the same.

[4] For convenience, in this judgment, the parties will be referred to as they were in the High Court. The background facts of this appeal are important to understand the context in which these appeal was brought.

BACKGROUND FACTS

[5] The plaintiff is the local authority established pursuant to s 3 of the Local Government Act 1976 ('the LGA') for the administration of local government in the Subang Jaya area. The plaintiff is also responsible for the town planning, environmental protection and building control, social and economic development and general maintenance functions of urban infrastructure in Subang Jaya. As the local authority the plaintiff is also the local planning authority for the Subang Jaya area pursuant to s 5 of the Town and Country Planning Act 1976 ('the TCPA').

[6] Under the Street, Drainage and Building Act 1974 ('the SDBA') the plaintiff is the local authority in charge of street, drainage and building in the Subang Jaya area with specific powers as provided under the SBD. The Uniform Building By-Laws 1984 ('the UBBL') is a by-law made pursuant s 133 of the SDBA. The UBBL sets out amongst others, the procedures for the submission and approval of building plans.

[7] The defendant, formerly known as Valiant Wealth Sdn Bhd is a developer. Malaysia Land Properties Sdn Bhd, is a shareholder of the defendant. The defendant submitted an application for planning permission of a proposed development in addition to the existing hotel building known as

the Grand Dorsett Hotel. The hotel was approved as one block titled hotel as a non-strata titled hotel. The hotel is situated on Lots 4244 and 4245, Mukim Damansara, Daerah Petaling, Selangor Darul Ehsan ('the lots') and located fronting a main road known as Jalan SS1/21, Subang Jaya.

THE FIRST APPLICATION

[8] The first application for planning permission (No 1/530) for a proposed development on the lots to the plaintiff was submitted on 4 May 2007 by Malaysia Land Properties Sdn Bhd (the holding company of the defendant) ('the first application'). The proposed development under the first application included:

(a) five blocks of 23 storey commercial serviced apartment with 944 units as well as 11 storey carpark podium; and

(b) one block of 23 storey commercial serviced apartment with 322 units connected to the hotel together with a 11 storey carpark podium.

[9] The first application was rejected by the plaintiff on 29 August 2007 on the following grounds:

(a) maximum plot ratio of 1:4;

(b) carpark requirements of two carparks to one serviced apartment unit were not met; and

(c) provision with regards to motorcycle carparks.

[10] The neighboring landowners surrounding the said Lots had also objected to the proposed development.

THE SECOND APPLICATION

[11] Subsequently, on 31 October 2008 Valiant Wealth Sdn Bhd (the defendant before the change of name of the company) submitted a fresh application for planning permission ('the second application').This time the proposed development included:

(a) five storey commercial space;

(b) addition to existing hotel building;

(c) one 19 storey hotel apartment with lobby;

(d) one 19 storey serviced apartment with a lobby; and

(e) a six storey carpark with two storey basement.

[12] The second application was also rejected by the plaintiff on 24 August 2009 on the following grounds:

(a) the proposal in respect of commercial space and serviced apartments was not allowed;

(b) multi-purpose development proposal other than for the purpose of a hotel will increase the traffic congestion along the Jalan SS12/1 which is the only access to SS12; and

(c) the proposed connecting road at Subang Ria Lake Gardens cannot be declared as the second proposed access of the proposed development as the proposed development of the Subang Ria Lake Gardens have yet to be submitted by Sime Darby Properties.

THE THIRD APPLICATION

[13] Finally, the third application which is the subject matter of the appeal, was submitted by the defendant on 12 February 2010 for the following proposed development ('the third application'):

(a) addition to the existing hotel;

(b) two blocks of 17 storey hotel suites with 1989 units with a lobby;

(c) one storey recreational space and swimming pool;

(d) one storey basement carpark; and

(e) five storey carparks.

[14] On 5 October 2010 the third application was approved and planning permission granted by the plaintiff subject to the fulfilment of certain conditions.

THE BUILDING PLAN

[15] The defendant submitted the building plan to the plaintiff sometime in June 2011. The building plan contains the detailed technical specifications of the hotel suites. On 8 August 2011 the defendant was notified that the *Mesyuarat Jawatankuasa Pusat Setempat* ('the One Stop Center/OSC') had approved the building plan subject to the compliance of certain conditions on or before 7 October 2011.

[16] By a notification dated 28 December 2011, the plaintiff confirmed the approval of the building plan based on the approval by OSC made on 2 August 2011. The building plan was valid for a year commencing from 28 December 2011 and expiring on 27 December 2012.

[17] On 6 September 2012 the plaintiff notified the defendant that the OSC meeting held on 14 August 2012 decided to defer the planning permission granted based on two reasons:

(a) the defendant was required to conduct a special briefing to provide information relating to additional carparks pending demolition works at a date and time to be fixed; and

(b) the defendant was required to obtain reviews and written support from the plaintiff's building department as well as the valuation and management department.

[18] The following day on 7 September 2012 the plaintiff commenced the High Court suit against the defendant.

THE PLAINTIFF'S CLAIM

[19] It is the plaintiff's pleaded case that the Building Plan No MPSJ/BGN/KW/1–6/162 for the third application was mistakenly approved by the plaintiff on 28 December 2011 ('the building plan') after the expiry of the planning permission on 4 October 2011. In the statement of claim, the plaintiff contended that by a letter dated 28 December 2011 the plaintiff had mistakenly informed the submitting person and the defendant regarding the building plan approval. Therefore, according to the plaintiff the building plan approval on 28 December 2011 granted by the plaintiff is invalid and void ab initio.

[20] At the time of commencement of building works pursuant to s 70(9) of the SDBA the planning permission and building plan approval must be valid and subsisting. The 'Form B' which is a 'Notice of Commencement of Building Works' submitted by the defendant's Architect, NRY Architects Sdn Bhd ('NRY') by letter dated 16 March 2012 pursuant to s 79(9) of the SDBA is invalid and void ab initio since the planning permission had lapsed on 5 October 2011 and the building plan approved on 28 December 2011 is invalid and void. It is the contention of the plaintiff that the commencement of the said building works on or about 16 March 2012 is invalid, unlawful and contrary to s 70(1) of the SDBA.

[21] The plaintiff had considered the building plan for the purposes of hotel use only in accordance with the grant of the planning permission and the UBBL 1984 and not for the purpose of other use or mixed development. Furthermore, the third application involved a strata scheme and sale of the 1989 rooms to the public. The plaintiff did not impose conditions relating to the Strata Titles Act 1985 and did not fix specific areas as common property in the said building plan.

[22] Sometime in early April 2012 the plaintiff received complaints from Subang Jaya residents that the defendant had sold the rooms in the hotel suite which had been given planning permission and building plan approval as an apartment unit or condominium unit contrary to the planning permission that has been granted for development of hotel only. The sale of the hotel suites referred to as hotel apartments in the sale and purchase agreement between the parties constitutes a breach of planning control and/or contrary to the planning permission that has lapsed.

[23] The defendant had therefore acted in blatant disregard of the planning permission that lapsed. The building plan approval is invalid and void and of no legal effect. The defendant's action of selling the rooms in the two blocks of hotel suite building which contains 1989 rooms to the public will make the rooms an 'unauthorized development' and contrary to s 19 of the TCPA.

[24] The actions and conduct of the defendant in selling the rooms in the hotel suite to the public contrary to the planning permission that has lapsed and building plan approval, which is invalid and void and of no legal effect is unlawful. The defendant's action also amounts to a serious contravention of planning control and building control and will make the rooms concerned as unauthorised.

[25] The plaintiff sought the following reliefs:

(a) a declaration that the planning permission dated 5 October 2010 together with the Layout Plan No MPSJ.PS. 260/1/530 *Jld* 3(40) granted by the plaintiff to the defendant is meant for the use of hotel only;

(b) a declaration that the defendant does not have a valid planning permission as at 5 October 2011 in respect of the following:

(i) to build addition to existing hotel building;

(ii) to build two block 17 storey hotel suite (1,989 rooms) building with lobby;

(iii) to build one storey recreational space and swimming pool;

(iv) to build one story basement car park; and

(v) to build five storey car park;
on the said Lots 4244 and 4245.

(c) a declaration that the Building Plan No MPSJ/BGN/KW/A-6/162 approved on 28 December 2011 by the plaintiff is ultra vires, invalid, unlawful and cannot be relied upon by the defendant under any circumstances;

(d) a declaration that the Building Plan No MPSJ/BGN/KW/A-6/162 approved on 28 December 2011 by the plaintiff is invalid and of no legal effect from the outset for all purposes and that no lawful consequences can flow from it;

(e) a declaration that the notice of commencement of building works' submitted by the defendant's architect pursuant to s 70(9) of the SDBA is invalid and void and of no legal effect and the commencement of building works is in contravention of s 80 of the same Act;

(f) a declaration that any building works commenced or any erection of building based on the lapsed planning permission is invalid and void after 5 October 2011;

(g) a declaration that the planning permission dated 5 October 2010 together with the Layout Plan No MPSJ.PS 260/1/530 *Jld* 3(40) granted to the defendant has not been implemented vide a valid building plan before the planning permission expired on 4 October 2011;

(h) an injunction restraining the defendant, their servants, their agents and/or otherwise howsoever forthwith from further continuing or carrying out any building works or erection of a building on Lot 4244 and 4245, Mukim Damansara, Daerah Petaling, Selangor Darul Ehsan based on the planning permission dated 5 October 2010 and the Building Plan No MPSJ/BGN/KW/A-6/162 approved on 28 December 2011;

(i) an injunction restraining the defendant, their servants, their agents and/or otherwise howsoever forthwith from using or permitting or allowing Lots 4244 and 4245, Mukim Damansara, Daerah Petaling, Selangor Darul Ehsan to be used for service apartments or hotel apartments without a valid planning permission and building plan approval;

(j) an injunction prohibiting the defendant, their servants, their agents and/or otherwise forthwith from constructing additions to the existing hotel and/or erecting strata title serviced apartments or strata title hotel apartments on Lots 4244 and 4245, Mukim Damansara, Petaling District, Selangor Darul Ehsan based on the planning permission dated 5 October 2010 that has lapsed and Building Plan No MPSJ/BGN/KW/A-6/162 that is invalid, void and unlawful; and

(k) costs.

THE DEFENDANT'S CASE AND COUNTER CLAIM

[26] The defendant contended that when the third application was made the plaintiff was fully aware of the application for amalgamation of the two lots.

The plaintiff had never enquired or sought any clarification as to whether the term 'hotel suite' denotes the definition as unilaterally assigned by the plaintiff.

[27] Subsequent to the approval of the planning permission on 5 February 2010 the plaintiff had imposed various conditions on the defendant which conditions were required to be complied by the defendant in order to obtain approval of the building plan. All the conditions imposed were duly complied with by the defendant.

[28] The plaintiff had approved the building plan submitted on 28 December 2011 and had proceeded to notify the submitting person and the defendant even though the planning permission had lapsed by then. In reliance upon the building plan approved by the plaintiff, the defendant through NRY submitted the notice of commencement of building works to the plaintiff and had since completed the refurbishment of the swimming pool.

[29] Since the plaintiff had approved the building plan on 29 December 2011 the defendant was not required to apply for an extension of the planning permission prior to the alleged expiry of the said planning permission.

[30] The defendant denied that the sale of the hotel suite is contrary to the planning permission granted by the plaintiff. Having obtained a valid planning permission, the defendant had applied on 27 December 2011 to the controller of housing for a housing developer license for the sale of the hotel suites.

[31] At all material times, the defendant has acted within the law and/or regulations. There are no stipulations in the planning permission that the hotel suites cannot be sold. Upon obtaining the plaintiff's approval for the building plan, the defendant proceeded to sell the hotel suites to the members of the public. As at the date of filing of the counterclaim approximately 637 purchasers have executed the sale and purchase agreements in respect of the hotel suites. The defendant contended that the plaintiff's challenge of the sale of the hotel suites has led to a number of purchasers cancelling their purchases.

[32] The defendant filed a counterclaim against the plaintiff and sought the following reliefs:

(a) a declaration that the building plan which was submitted pursuant to the planning permission dated 5 October 2010 and approved by the plaintiff on 28 December 2011 is valid and subsisting;

(b) a declaration that the notice of commencement of building works submitted on 16 March 2012 by the defendant's architect, NRY Architects Sdn Bhd, pursuant to the planning permission granted on 5 October 2010, is valid and subsisting; and

(c) an order that the defendant is entitled to be indemnified in full for the following:

(i) damages suffered by the defendant as a result of the termination of the sale and purchase agreement in respect of the sale of the hotel suited by the purchasers;

(ii) damages suffered by the defendant as a result of the cancellation of the reservation for the purchase of the hotel suits by potential purchasers;

(iii) damages suffered by the defendant as a result of the claims for liquidated ascertained damages by the purchasers of the hotel suites against the defendant;

(iv) loss of profit; and

(v) wasted expenditure incurred by the defendant.

THE ISSUES

[33] The issues for the determination of the High Court were as follows:

(a) whether the planning permission dated 5 October 2010 together with the Layout Plan No MPSJ.PS.260/1/530 *Jld* 3(40) (the third application is for hotel accommodation only);

(b) whether the defendant have a valid planning permission as at 5 October 2011;

(c) whether the Building Plan No MPSJ/BGV|N/KW/A-6/162 approved on 28 December 2011 is ultra vires, invalid, unlawful and of no legal effect;

(d) whether the notice of commencement of building works submitted by the defendant's architect on 16 March 2012 pursuant to s 70(9) of the SDBA is valid and void and of no legal effect;

(e) whether any building works commenced or any erection of building based on the lapsed planning permission is invalid and void after 5 October 2011;

(f) whether the hotel suites may be sold individually or separately to any person;

(g) whether the sale of the hotel suites by the defendant constitutes a contravention of the planning control and/or the planning permission granted by the plaintiff; and

(h) whether the plaintiff is estopped from insisting and contending that the planning permission had expired on 5 October 2011 and that the

subsequent building plan approval by the plaintiff and the notice of commencement of building work submitted by the defendant are void, invalid and of no legal effect.

DECISION OF THE HIGH COURT

[34] The learned judicial commissioner ('JC') made the following findings:

(a) the planning permission was meant for the use of hotel only. She concluded that the sale of the hotel suites by the defendant was contrary to the planning permission and would tantamount to unilaterally changing the use of the land from hotel to a serviced apartment. The plaintiff did not intend to approve any development on the lots which included the development of a serviced apartment. In her grounds of judgment Her Ladyship said this:

> [41] The term Hotel Suite was for all intend and purposes of the planning application was processed and granted as a hotel development based on existing guidelines, local plan, zoning and documents submitted by the defendants (sic). The proposal report of the third application submitted by the defendant to the plaintiff is the hotel suites are hotel rooms and not for sale. Further, since the planning permission was granted for non-strata title development there is no requirement to impose a condition that hotel suite cannot be sold. Therefore, I find that the plaintiff did not intend to approve any development on the said lots which involved in commercial and business including the development of commercial serviced apartment.

(b) the planning permission lapsed on 5 October 2011 and the defendant did not comply with s 24(1) and (3) of the TCPA. There was no application for extension of time by the defendant prior to that date. The approval of the building plan took effect on 28 December 2011 when the planning permission had expired. The plaintiff had admitted that it was mistake to approve the building plan as it was not aware that the planning permission had lapsed. The learned JC was of the view that:

> [49] Since the planning permission had expired on 5 October 2010, it follows that the building plan which was approved on 28 December 2011 and the notice of commencement of building works submitted by the defendant on 16 March 2012 is invalid, void and has no legal effect.

(c) the doctrine of legitimate expectation does not apply in this case as there was no evidence of unfairness or conduct of the plaintiff which had resulted in the defendant having suffered any inconvenience in the matter of extension of the planning permission (see paras 50–52 grounds of judgment);

(d) the learned JC further held that the existence of the exhibition space and the sales office cannot be assumed to solely facilitate the sale of the hotel

suites. Furthermore, the building plan for the show gallery and sales office did not specify that it was meant for sale of the hotel suites; and

(e) the issuance of the advertisement and sale permit together with the housing developer's license was under the pretext for the sale of the serviced apartment. Although the housing developer's license granted is valid but not applicable and of no legal effect to the hotel suites:

> [57] Therefore, the advertisement and sale permit together with the housing developer's license granted, though are valid, is not applicable and of legal effect to the hotel suites. Furthermore, the selling of the hotel suites as serviced apartment is contrary to the planning permission and would tantamount to unilaterally change the use of the land from hotel accommodation to serviced apartments. This obviously had deviated from the planning permission, local plan, manual guidelines ... It follows that the defendant is not permitted to proceed with the sale of the hotel suite as it constitutes a contravention of the planning control and/or the planning permission granted by the plaintiff.

OUR DECISION

The law

[35] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. The general principle is that the conclusion of a trial judge is a finding of fact on the oral evidence based on the demeanors and credibility of the witnesses before him or her. Generally, such finding ought not to be disturbed unless the appellate court is convinced that it is plainly wrong. It would not be sufficient to warrant any interference merely because the appellate court entertains doubt whether such finding is right.

[36] The principles of appellate intervention have been dealt with at length by this court in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 where the Court of Appeal held as follows:

> No doubt, an appeal court will be slow in disturbing a finding of fact recorded by the trial court based on proper appreciation of evidence but it is also the duty of the appellate court to disturb it if the burden of proof is not discharged by cogent, positive and acceptable evidence in the light of the law laid down by this court. More so when there is non-consideration of material evidence and appreciation of evidence is not objective and one sided.

[37] Reference is also made to the decision of the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 where the Federal Court held that the test of 'insufficient judicial appreciation of evidence' adopted by the Court of Appeal was in relation to the

process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

[38] The appellate court must therefore be slow to interfere with the findings made by the trial court unless if it be shown there was no judicial appreciation of the evidence adduced before it.

[39] Before we proceed to deal with the issues before us and for ease of our discussion of the same we feel that it necessary to set out the relevant provisions of the LGA, the TCPA and the SDBA.

The Local Government Act 1976

[40] The general powers and functions of a local authority is derived from the LGA. The plaintiff is a body corporate and has perpetual succession and may sue and be sued, acquire, hold and sell property and generally do and perform such acts and things as bodies corporate may by law do and perform. Section 8 of the LGA provides that:

> The affairs of every local authority area shall be administered by a local authority established by and in accordance with this Act ...

[41] As the local authority for the Subang Jaya area the plaintiff administers the affairs of the Subang Jaya area such as the general control and care of all public places within the area. Under the Act the plaintiff is given the powers amongst others to establish, maintain and carry out such sanitary services for dealing with effluent and also to erect, maintain, let, control and manage markets and market buildings, lodging houses, rooms or buildings kept for public refreshment, shops, stalls and stands, and to control the occupation and use thereof.

[42] The functions and powers of the plaintiff as a local authority are not limited to the provisions of the LGA but also extend to those provided for under various other legislations.

The Town and Country Planning Act 1976

[43] The TCPA is an Act enacted for the purpose of ensuring uniformity of law and policy as well as control and regulation for city/town and country planning in the local authorities areas and for purposes connected therewith or ancillary thereto. The TCPA sets the framework for local authorities to formulate structure plans and guidelines for the preparation of local plans to control and regulate the use of land and buildings and property developments in the local authority areas.

[44] The functions of the local planning authority under the TCPA are provided under s 6 of the TCPA. Section 6 of the TCPA provides as follows:

> (a) to regulate, control, and plan the development and use of all lands and buildings within its area;
>
> (b) to undertake, assist in, and encourage the collection, maintenance and publication of statistics, bulletins, and monographs, and other publications relating to town and country planning and its methodology; and
>
> (c) to perform such other functions as the State Authority or the Committee may from time to time assign to it.

[45] Section 19(1) of the TCPA further provides that no person, other than a local authority, shall commence, undertake, or carry out any development unless planning permission in respect of the development has been granted to him under s 22 or extended under sub-s 24(3). An application for planning permission in respect of a development shall be made to the local planning authority pursuant to s 21(1) of the TCPA:

> (1) An application for planning permission in respect of a development shall be made to the local planning authority and shall be in such form and shall contain such particulars and be accompanied by such documents, plans, and fees as may be prescribed.

[46] Section 22 of the same Act reads:

> (1) As soon as possible after the receipt of an application for planning permission, or, if the application is one to which subsection 21(6) applies, as soon as possible after the expiry of the period within which objections may be made or, if objections have been made, as soon as possible after the objections hive been dealt with under subsection 21(7), the local planning authority shall decide on the application for planning permission.
>
> (2) In dealing with an application for planning permission, the local planning authority shall take into consideration such matters as are in its opinion expedient or necessary for proper planning and in particular —
>
> (a) the provisions of the development plan, if any;
>
> (aa) the direction given by the Committee, if any;
>
> (b) the provisions that it thinks are likely to be made in any development plan under preparation or to be prepared, or the proposals relating to those provisions;
>
> (ba) the provisions of the Sewerage Services Act 1993 [Act 508];
>
> (bb) the development proposal report;

(bc) the provisions of the Solid Waste and Public Cleansing Management Act 2007 [Act 672]; and

(c) the objections if any, made under section 21.

[47] As the local planning authority the plaintiff may, subject to sub-s 22(4) of the same Act, grant planning permission either absolutely or subject to such conditions as it thinks fit to impose, or refuse to grant planning permission. Under s 22(4) of the said Act the plaintiff shall not grant planning permission if:

(a) the development in respect of which the permission is applied for would contravene any provision of the development plan; or

(aa) the development in respect of which the permission is applied for would contravene the provision of paragraph (2)(aa),

(b) the applicant for planning permission has neither paid the development charge payable in respect of the development nor obtained the permission of the local planning authority under subsection 34(1) to pay the development charge by instalments.

[48] If planning permission is granted, whether with or without conditions, it shall be conveyed to the applicant in the prescribed form and at the same time a notice of the grant thereof shall be given to any person who has made any objection pursuant to sub-s 21(6) (see: s 22(6) of the TCPA). The planning permission granted under sub-s 22(3) shall, unless extended, lapse 12 months after the date of the grant thereof if, within that time, the development had not commenced in the manner specified in the planning permission. Section 24 of the said Act provides:

(1) A planning permission granted under subsection 22(3) shall, unless extended, lapse twelve months after the date of the grant thereof if, within that time, the development had not commenced in the manner specified in the planning permission.

(2) Subsection (1) shall not apply to a planning permission that expressly states that the development for which the planning permission is granted does not involve any building operation.

(3) On an application being made in that behalf in the prescribed manner before the planning permission lapses, the local planning authority may, on payment of the prescribed fee, grant an extension or further extension of the planning permission.

(4) A planning permission extended under subsection (3) shall, unless further extended, lapse twelve months after the date of the extension thereof if within that time, the development had not commenced in the manner specified in the planning permission.

(5) In granting an extension or further extension of a planning permission under subsection (3), the local planning authority may impose such conditions on the planning permission as it thinks fit or vary the conditions originally imposed; and section 23 shall apply with the necessary modifications to the imposition or variation of conditions under this section as it applies to the imposition of conditions under subsection 22(3).

The Street Drainage and Building Act 1974

[49] The SDBA sets out rules to regulate the activities relating to street, drainage and building in local authority area. In addition to the functions and powers conferred under the LGA and the TCPA it is expressly provided under the SDBA that no person shall erect any building without the prior written permission of the local authority. Any person who intends to erect any building shall cause to be submitted by a principal submitting person or submitting person:

(a) to the local authority such plans and specifications as may be required by any by-law made under this Act; and

(b) to the relevant statutory authority such plans and specifications as may be required by any other written law. (See: section 70 of the SDBA).

[50] Bearing in mind these relevant legislations in particular in respect of planning permission and building plans we shall now consider the issues before us.

The One Stop Centre

[51] At this juncture it is pertinent to consider the role and function of the One Stop Centre ('OSC') vis a vis the process of approval of a planning permission. In order to facilitate and expedite planning approvals for land development the OSC was set up in each local authority. The main function of the OSC is to coordinate, facilitate and expedite the process of approving applications for land developments, planning permits applications, building plans, earthworks plans, roads and drains plans and other plans related to development.

[52] The OSC will distribute the applications received for planning permission and building plan to all the relevant technical departments/agencies for comments and views. The OSC will then supervise and coordinate the comments and overviews of the relevant technical departments/agencies for discussion and consideration at the *Mesyuarat Jawatankuasa* OSC.

[53] The OSC comprised all the relevant technical departments necessary in

the consideration of a planning permission application as follows:

(a) Jabatan Perancangan Bandar dan Desa Selangor;

(b) Pejabat Tanah Daerah Petaling;

(c) Jabatan Kerja Raya Selangor;

(d) Indah Water Konsortium;

(e) Jabatan Alam Sekitar Negeri Selangor;

(f) Jabatan Pengairan dan Saliran Daerah Petaling;

(g) Tenaga Nasional Berhad;

(h) Jabatan Mineral & Geosians Selangor;

(i) Syarikat Bekalan Air Selangor;

(j) Telekom Malaysia Berhad;

(k) Jabatan Kejuruteraan MPSJ; and

(l) Jabatan Bangunan MPSJ.

[54] Each department and/or division will be given a copy of the proposal to study the proposed development in detail and to give their technical views, that is, whether they object to the proposed development or they have no objection or if they have no objection but certain conditions must be fulfilled by the applicant/developer. This can be gleaned from all the three planning permissions issued by the plaintiff.

Whether the planning permission dated 5 October 2010 together with the Layout Plan No MPSJ.PS.260/1/530 Jld 3(40) (the third application) is for hotel accommodation only

[55] Learned counsel for the defendant submitted that the learned JC erred in finding that the planning permission was meant for use of hotel only and that the sale of the hotel suites by the defendant was contrary to the planning permission and tantamount to unilaterally changing the use of the land from hotel to serviced apartments.

[56] In order to determine whether the planning permission dated 5 October 2010 together with the Layout Plan No MPSJ.PS.260/1/530 *Jld* 3(40) is for hotel accommodation only ('the third application') it is essential to examine the history of the three planning applications submitted by the defendant bearing in mind that all the three applications are separate applications. The learned JC observed that prior to the third application the defendant had submitted two applications for the development of the two lots.

Both applications were rejected by the plaintiff. The learned JC considered the evidence and had come to the following observation that when the defendant submitted the planning permission for 'hotel suites' they were aware that any application for planning permission involving serviced apartment would not be considered by the plaintiff:

> [33] I am satisfied that the defendant has accepted the decision and has full knowledge of the reasons for refusal of the first and second applications due to its purpose for other kinds of buildings or activities other than hotel accommodation. In fact the principal submitting person for the defendant, ie Citiplan Networks, for the first and second applications was the same person that has knowledge of the history of the submission. I am of the view that the relevance of planning history at the development site cannot be disregarded as it provide evidence of the importance of the permitted activity namely hotel use on the development site.

[57] The learned JC concluded that the term 'hotel suite' in the third application meant that it is a hotel accommodation as the planning guidelines and planning standards used and referred to the location and the site of the proposed development. In her grounds of judgment Her Ladyship said:

> [37] This would bring to the conclusion that the Hotel suites is an extension to the existing hotel building sharing all the common facilities. It also confirmed that the proposed development together with the existing hotel would not be subdivided into parcels or units or subject to a strata scheme. Thus, I find that the term 'Hotel suite' would reasonably relate to hotel accommodation and can be categorised as 'Hotel'.

[58] Learned counsel for the defendant argued that the sales of hotel suites is not uncommon. Development concepts such as 'serviced apartments', 'hotel apartments' and 'hotel suites' are not statutorily defined in any legislation. Therefore, there was no basis for the learned JC to conclude that 'hotel suites' can only be for hotel accommodation only. Her Ladyship failed to appreciate the planning history that by the time the third application was submitted the plaintiff knew at all material times that the defendant's proposed development contemplated the sale of the hotel suites. This fact can be discerned from all the correspondences between the parties in relation to the planning permission.

[59] All the three applications submitted by the plaintiff were submitted and considered by the OSC comprising of all the aforementioned departments. In the first application the defendant had proposed renovating the present hotel as well as constructing five blocks of commercial serviced apartment. The first application submitted was rejected by the plaintiff on 13 September 2007. The reasons for the rejection can be found in the letter dated 13 September 2007 as follows:

> Majlis Perbandaran Subang Jaya telah menolak kebenaran merancang di atas sebab-sebab berikut:

(1) Nisbah Plot maksima yang dibenarkan ialah 1:4.

(2) Keperluan Tempat Letak Kereta bagi Komersial 'Service Apartment' adalah 2 petak = 1 unit pangsapuri. Bilangan petak yang disediakan tidak mencukupi sebanyak 175 petak.

(3) Tempat letak Motosikal yang perlu disediakan adalah sebanyak 611 mengikut kiraan penyediaan iaitu 20% daripada bilangan Tempat Letak Kereta.

[60] The defendant then submitted the second application on 31 October 2008 for the plaintiff's consideration and approval. The second application was rejected by the plaintiff for the following reasons as stipulated in their letter dated 24 August 2009:

Pihak Majlis Perbandaran Subang Jaya telah menolak Kebenaran Merancang di atas atas sebab-sebab berikut:

(a) Cadangan servis apartment dan ruang perniagaan tidak dibenarkan;

(b) Pelbagaian cadangan jenis pembangunan selain kegunaan hotel akan meningkatkan kesesakan lalulintas di Jalan SS12/1 yang merupakan satu-satunya jalan masuk ke kawasan SS12 (Sime Darby Medical Centre, Hotel Holiday Villa, kawasan perumahan Wangsa Baiduri, Hotel Sheraton Subang, Taman Tasik Subang Ria dan kedai/perumahan teres serta banglo SS12) dari Jalan Kewajipan; dan

(c) Cadangan jalan sambung di Taman Tasik Subang Ria tidak boleh di jadikan cadangan akses kedua cadangan pembangunan ini kerana Cadangan Pembangunan Taman Tasik Subang Ria belum dikemukakan oleh Sime Darby Properties Sdn Bhd.

[61] Despite the rejection of the second application for planning permission in 2008 the defendant submitted a fresh application, the third application dated 12 October 2010. Since the plaintiff rejected the proposed plan to construct service apartments and business spaces as it may cause traffic congestion in that area, in particular along Jalan SS 12/1, the third application proposed amongst others, the construction of a two block 17 storey hotel suite with 1989 units. The detailed *Lapuran Cadangan Pemajuan* was submitted together with the application.

[62] The plaintiff granted the planning permission subject to the conditions as decided by the *Mesyuarat Jawatankausa OSC bil 19/2010* on 5 October 2010. In the letter dated 5 October 2010 the plaintiff acknowledged and approved the plan which included the construction of the hotel suite. However, the defendant was required to contribute to the costs of the construction of the second access road to Persiaran Kewajipan. This was explained by the plaintiff in the said letter as follows:

1. Cadangan pembangunan yang diluluskan adalah seperti jadual guna tanah dan pelan kelulusan yang diperakukan di dalam pelan bil. *MPSJ. PS. 260/1/530 Jld 3 (40).*

Komponen Pembangunan	Unit	Ekar	Peratus (%)
Hotel suite	1,989 bilik	2.57	27.55
Tambahan hotel	-	0.789	8.47
Kolam	-	0.452	4.85
Laluan pejalan kaki	-	0.408	4.38
Kawasan lapang	-	1.108	11.88
Jalan/tempat letak kereta	-	1.25	13.40
Jumlah kecil		**6.577**	**70.53**
Bangunan sedia ada		2.57	29.47
Jumlah	**-**	**9.33**	**100.00**

2. *Pemaju perlu menyumbang kepada pembinaan laluan kedua ke Persiaran Kewajipan yang akan diputuskan kemudian oleh Pihak Majlis setelah kos terperinci berkenaan diperolehi.*

[63] Some of the members of the OSC did not object to the proposed development but required the defendant to fulfill certain conditions. Others had no objection at all of the proposed development. The said letter was signed by the plaintiff's Yang Dipertua. The letter formally notifying the approval of the planning permission is dated 9 October 2010.

[64] Subsequently, the plaintiff approved the building plan vide a letter dated 8 August 2011. In both the letters (ie the letters dated 5 October 2010 and 8 August 2011) the issue of the sale of the hotel suites was never queried, raised or highlighted. There was no element of misapprehension or doubt when the letter of approval was issued. By the letter dated 5 October 2010 the defendant was required to comply with all the conditions as stipulated in the said letter within 60 days from the date of the letter that is, *on or before 7 October 2011.* On 28 December 2011 the OSC approved the building plan submitted by the defendant:

> 2. Untuk makluman tuan, *Mesyuarat Jawatankuasa Pusat Setempat (OSC)* Bil. 15/2011 bertarikh 2 Oktober 2011 telah *bersetuju meluluskan* permohonan kelulusan pelan bangunan bagicadangan diatas ...

[65] The said approval was valid for a period of one year commencing from 28 December 2011 and expiring on 27 December 2012. The construction of the building must be completed within that one year and any application for extension must be given at least three months before the expiry.

[66] According to the plaintiff sometime in April 2012 it received complaints from the residents of Subang Jaya that, unbeknownst to the

plaintiff the defendant had sold the hotel suites to members of the public. The defendant had advertised the sale of the hotel suites in newspapers as well through its webpage. Sale and purchase agreements ('SPA') were executed between the defendant and purchasers. It is the submission of learned counsel for the plaintiff that the development proposal report of the third application is for the purposes of a hotel with no sale of the hotel suites involved.

[67] Furthermore, the final title of the amalgamated lots registered as Lot 16 on 7 December 2013 had expressed condition. By selling the hotel suites the use of the land changed and contravened the planning guideline, the local plan and zoning of the area inconsistent with the development proposal project and the traffic impact assessment pursuant to the TCPA.

[68] It is the submission of learned counsel for the plaintiff that the plaintiff had mistakenly approved the building plans for hotel accommodation. It was argued by learned counsel for the plaintiff that the plaintiff had never intended to approve any development on the said Lots which had business spaces and commercial serviced apartments. Furthermore, the planning permission had lapsed on 15 October 2011 and the defendant failed to comply with s 24(1) and (3) of the TCPA. The said sections provide:

> (1) A planning permission granted under subsection 22(3) shall, unless extended, lapse twelve months after the date of the grant thereof if, within that time, the development had not commenced in the manner specified in the planning permission.
>
> ...
>
> (3) On an application being made in that behalf in the prescribed manner before the planning permission lapses, the local planning authority may, on payment of the prescribed fee, grant an extension or further extension of the planning permission ...

[69] A public authority such as the plaintiff is expected to carry out its function with due care and diligence when considering application for planning permission. The OSC comprised various departments each having its own technical expertise. In considering the application for planning permission the OSC must have regard to all the relevant factors and exclude any irrelevant considerations.

[70] In the written submission learned counsel for the defendant explained that the building plan contained detailed technical specifications of the hotel suites. The average size of a hotel room varies between 300 to 350 sqft but the average size of the hotel suites is 498 sqft. A hotel normally requires one main drop off lobby and a reception. The hotel suites as described in the proposal consist of two towers with each tower having their own respective drop off

lobby and reception. There is also no provision for centralised air conditioning system for the hotel suites.

[71] The defendant was notified on 8 August 2011 that the OSC meeting ie the *Mesyuarat Jawatankuasa Pusat Setempat* had on 2 August 2011 approved the building plan subject to the defendant complying certain technical conditions on or before 7 October 2011. The plaintiff confirmed its full approval of the building plan on 28 December 2011 based on the same approval by the *Mesyuarat Jawatankuasa Pusat Setempat* on 2 August 2011.

[72] On 17 January 2011 the defendant, through its consultant submitted its layout plan, sewerage plan and engineering report to the plaintiff. Indah Water approved the sewerage reticulation design plan on 19 October 2011. The defendant submitted its road works plan as well as the road, drainage and street lighting plan to the plaintiff and all was approved by the plaintiff on 7 October 2011 and 3 December 2011. The defendant had submitted all the plans to the respective authorities as required.

[73] Sometime in April 2011, the defendant submitted the building plan for the show gallery and sales office. This was an additional proposal. However, even then the plaintiff did not raise any objection or made any queries but instead accepted the building plan. In fact, on 28 June 2011 the plaintiff notified the defendant that the *Mesyuarat Jawatankuasa Pusat Setempat* had approved the building plan for the construction of the show gallery and sales office subject to certain conditions which was duly complied by the defendant.

[74] The defendant then applied on 27 December 2011 to the controller of housing for a developer license pursuant to the Housing Development (Control and Licensing) Regulations 1989 and was granted a housing developer license on 16 February 2012.

[75] It was only after receiving complaints from the residents of Subang Jaya that the plaintiff had written to the Ministry of Housing requesting the Ministry to revoke and suspend the housing developer license granted to the defendant on the grounds that the sale of the hotel suites was contrary to the planning permission.

[76] The Secretary General of the Housing and Local Government responded by a letter dated 19 June 2012 addressed to the Yang Dipertua of the plaintiff notifying that the Ministry will not revoke the license issued to the defendant:

> 4. Sekiranya pihak MPSJ tidak bercadang untuk menarik balik Kebenaran Merancang yang telah diluluskan mengikut peruntukkan (sic) Seksyen 25 Akta

Perancangan Bandar dan Desa 1972 [Akta 172] kerana dikhuatiri akan memudaratkan kepentingan para pembeli rumah sedia ada maka pihak KPKT *juga di bawah Seksyen 13 Akta Pemajuan Perumahan (Kawalan dan Pelesenan)1966, tidak becadang untuk menarik balik lesen pemaju bagi menjaga kepentingan para pembeli.*

[77] By a letter dated 6 September 2012 the plaintiff informed the defendant that the *Mesyuarat Jawatankuasa Pusat Setempat* had decided on 14 August 2012 to defer the planning permission granted to the defendant and that the defendant was required to give a briefing but not about the sale of the hotel suites but the additional car parks:

(a) Pihak Pemohon perlu mengadakan satu taklimat khas bagi memberikan maklumat mengenai tempat letak kenderaan sementara semasa kerja-kerja perobohan dijalankan, Masa dan tarikh akan ditentukan oleh pihak Majlis.

(b) Perlu mendapatkan ulasan dan sokongan bertulis daripada Jabatan Bangunan dan Jabatan Penilaian dan Pengurusan Harta, Majlis.

[78] After the issuance of the aforesaid letter the following day, ie on 7 September 2012 the plaintiff commenced this suit against the defendant. Strangely, despite filing this action the plaintiff did not issue a stop work order to the defendant neither did they revoke the planning permission or the building plan for the project or for the construction of the show gallery and sales office. The plaintiff also did not issue any order to demolish the works already completed. The conduct of the plaintiff smacks of bad faith and ill intent.

[79] There was no evidence of any concealment of any material facts by the defendant. The defendant had stated in its proposed development paper that it planned to construct 1989 hotel suites. The plaintiff through the OSC had every opportunity to raise any queries with regard to the hotel suites, especially so with the distinct sizable number of hotel suites to be constructed. This the plaintiff omitted to do. The fact that there was no objection by the members of the OSC at any stage shows that due consideration was given. The absence of such objection was starkly present throughout the whole process.

[80] It is a fundamental principle of administrative law that a public body may only do what it is empowered or required to do by statute, whether expressly or by necessary implication. For decision makers this means that a public body must make a decision that lies within the parameters of its governing legislation. The decision of any public authority such as the plaintiff can only be challenged by way of judicial review. However, in the instant appeal the plaintiff is seeking a declaration from this court to declare its decision as ultra vires, invalid and of no effect because the plaintiff had by mistake

A approved the planning permission and the building plan.

[81] The case of *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223 established an important principle widely used in administrative law. In summary, the courts may only intervene to find that an
B authority had acted unreasonably when a decision had taken into account matters that it ought not have, or disregarded matters which it should have. Within that framework the discretion of the executive may not normally be challenged, provided that a decision was so absurd that no sensible authority so
C circumstanced could have possibly so concluded.

[82] We say, with respect, that the learned judicial commissioner had fundamentally erred in law and fact when she concluded that the sale of the hotel suites was contrary to the planning permission. In granting the approval
D of the building plan the plaintiff through the OSC had taken into account all the relevant factors in relation to the approval of the building plan within the framework of the relevant legislation. Based on the contemporaneous evidence the plaintiff through the OSC had arduously scrutinised and considered the third application. None of the departments or the division under the OSC had
E raised any queries, doubts, apprehension with regards to the 1989 units of hotel suites throughout the process of approval. Accordingly, on the facts and evidence we are of the opinion that the plaintiff had not mistakenly approved the building plan.

F *Whether the defendant have a valid planning permission as at 5 October 2011 and consequently the Building Plan No MPSJ/BGV\N/KW/A-6/162 approved on 28 December 2011 is ultra vires, invalid, unlawful and of no legal effect and whether the plaintiff is estopped from insisting and contending that the planning permission had expired on 5 October 2011 and that the subsequent building plan*
G *approval by the plaintiff and the notice of commencement of building work submitted by the defendant are void, invalid and of no legal effect*

[83] Learned counsel for the plaintiff submitted that it was a mistake in approving the building plan as it was not aware that the planning permission
H had lapsed. In response learned counsel for the defendant argued that the question of the defendant having to apply extension does not arise as on 2 August 2011 when the approval of the building plan, the planning permission was still valid. The plaintiff 's own witnesses. PW2 and PW3 testified during cross examination and confirmed that the planning permission
I was valid when the building plan was approved on 2 August 2011.

[84] After the approval of the planning permission on 5 October 2010 the plaintiff had continued to grant various approvals for various related submissions by the defendant. The plaintiff had imposed various conditions

required to be complied with by the defendant before granting the approval of the building plan.

[85] The defendant had complied with all the conditions imposed by the plaintiff. By letters dated 23 September 2011 and 6 October 2011 the defendant through its submitting person appealed for extension time of the planning permission. The plaintiff through its letter dated 19 October 2011 agreed to reconsider the appeal subject to payment of a fine:

> 2. Untuk makluman tuan, pihak MPSJ bersetuju untuk mempertimbangkan semula rayuan kelulusan cadangan di atas sehingga 21 October 2011 dengan syarat tuan dikehendaki membayar denda lewat selama 2 bulan iaitu 10% dari fi proses pelan berjumlah RM8,331.80.

[86] Due to the fulfillment of the conditions by the defendant, the plaintiff approved the building plan on 8 August 2011 and notified the defendant on the same date. The evidence showed that there was continuous communication between the plaintiff and the defendant throughout the planning permission and the approval of the building plan. The defendant had acted upon the approval of the building plan and submitted the notice of commencement of works. In fact, the plaintiff had even completed the works in relation to the refurbishment of the swimming pool.

[87] The learned judicial commissioner erred in failing to appreciate the sufficient available evidence before her in particular with regards to the process and procedure with regards to the approval of building plan in accordance with the relevant legislations. The defendant had applied for extension of the planning permission before it lapsed and that the plaintiff had considered the appeal.

[88] Accordingly, we find that the defendant had a valid planning permission as at 5 October 2011 and the Building Plan No MPSJ/BGV|N/KW/A-6/162 approved on 28 December 2011 is not ultra vires nor invalid or unlawful and of no legal effect. Based on the abovementioned reasons we are of the view that the plaintiff is estopped from contending that the planning permission had expired on 5 October 2011 and that the subsequent building plan approval by the plaintiff and the notice of commencement of building work submitted by the defendant are void, invalid and of no legal effect.

LEGITIMATE EXPECTATION

[89] Learned counsel for the defendant submitted that the learned JC had misdirected herself on the law of legitimate expectation and abuse of power. This is what she said in her grounds of judgment:

Since the planning permission had expired on 5 October 2010, it follows that the building plan which was approved on 28 November 2011 and the notice of commencement of building works submitted by the defendant on 16 March 2012 is invalid, void and has no legal effect. In *Sumita Development (M) Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor* [2014] 9 CLJ 406, the court held:

> [21] Generally, the starting point in any development is planning permission which is the main decision and all other approvals are subsidiary to it. Hence, building plans, earthworks or commencement of work etc are all approvals that must be sought but only after planning permission has been obtained. Once planning permission is rejected or expires, or is not renewed or extended, then everything else falls as a natural consequence. The latter (sic) approvals have no independent existence and are all incidental to the planning.
>
> [50] On the issue of legitimate expectation despite the fact that the defendant had not extended the planning prior to the commencement of building works, the plaintiff submitted that the its conduct in mistakenly approving the building plan for hotel accommodation does not give rise to a legitimate expectation on the part of the defendant that they can apply for a housing developer's license for serviced apartment and an advertisement and sale permit for serviced apartment and to commence work at the site pursuant to the building plan. I am in the agreement with the plaintiff because the defendant cannot rely on it. The doctrine of legitimate expectation applies depends on the facts of each case and should not override the express statutory requirement where in this case the defendant failed to comply. I am unable to see any unfairness or conduct of the plaintiff which the defendant had suffered inconvenience in the matter of the extension of the planning permission.
>
> [51] The doctrine of legitimate expectation cannot create a right when such right does not exist. In *North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun & Satu Lagi* [2011] MLJU 1529; [2011] 4 CLJ 729 the Federal Court held that whether or not the doctrine legitimate expectation applies depends on the facts of each case, it cannot and should not override the express statutory power vested in the state authority.

[90] It was further submitted by learned counsel for the defendant that the question is academic as the planning permission was extended and as such the doctrine of legitimate expectation does not apply. Learned counsel for the plaintiff submitted in response that the learned JC had applied the correct principles of law supported by good reasons. It is the contention of the plaintiff that the defendant's application for the housing developer license is illegal and the action of the defendant to sell the hotel suites without a valid planning permission is an unlawful conduct.

[91] The general rule is that the doctrine of estoppel and legitimate expectation is not ordinarily available against the government nor is the government bound by any representation which may have been made expressly or by conduct which if needed to be acted upon would invoke a breach of

statute. That position in law has been affirmed in Federal Court decision of *Government of The State of Negeri Sembilan & Anor v Yap Chong Lan & 12 Ors* [1984] 2 MLJ 123; [1984] 2 CLJ 150; [1984] 1 CLJ Rep 144.

[92] Whether or not the doctrine of legitimate expectation applies depends on the facts of each case, it cannot and should not override the express statutory power vested in the plaintiff as the local authority. The rationale for doctrine of legitimate expectation is based on the duty to act fairly as a necessary element of good governance or good administration (see W Wade & C Forsyth, *Administrative Law* (8th Ed, Oxford University Press: Oxford, 2000) pp 494–495. The Privy Council in the leading case of *A-G of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 held, in quashing a deportation order, that 'when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as the implementation does not interfere with its statutory duty'.

[93] We have earlier referred to the factual dispute between the parties on this aspect, with the defendant contending that the building plan was approved by the plaintiff the planning permission when the planning permission had lapsed. On the facts and the contemporaneous evidence the defendant had not deviated from the planning permission and had duly complied with all the conditions imposed by the plaintiff.

[94] In *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65 the respondent had sought to develop its land in Penang and build 183 units of flats. The respondent applied to the appelant, inter alia, for a planning permission. In June 1991, in an effort to implement its policy regarding low cost housing, the appelant asked the respondent to allocate 30% of the project to low cost houses. The respondent rejected the request, but had not appealed against the same. The appelant however granted planning permission with conditions attached to the planning permission, but none, concerned price. Consequently, there was a dispute as the price of the flats with the members of the respondent objecting to the price. The appelant refused to intervene and the respondent proceeded to sell the flats at a price above RM25,000.

[95] The planning permission was due to expire on 5 September 1992 and on 2 September 1992, the respondent applied for its extension which was only considered by the appelant ten months later. The appelant invoked s 24(5) of the TCPA and imposed additional conditions, including 'to complete 30% low-cost at RM25,000 per unit'. The respondent sought a review of the disputed condition but was rejected by the appelant. The respondent applied for an order of *certiorari* to quash the decision which was dismissed by the High

A Court on the that the respondent 's failure to avail itself of an alternative domestic appeal remedy under TCPA. On appeal, however, the Court of Appeal ruled that it was proper for the respondent to have opted for judicial review in the circumstances.

B **[96]** Edgar Joseph Jr FCJ in delivering the judgment of the Federal Court in *Majlis Perbandaran Pulau Pinang* said (at p 119):

> ... people expect fairness in their dealings with those who make decisions affecting their interests.

C

[97] In our view, this doctrine of legitimate expectation is couched in equity and subject to the relevant equitable doctrines. In our present case, the evidence overridingly shows that the defendant had relied on the representation of the plaintiff and had obediently and diligently complied and fulfilled the D conditions imposed by the plaintiff.

CONCLUSION

E **[98]** In the face of surmounting liability the plaintiff filed this suit seeking legal absolvement but in reality the suit was designed to evade liability and potential payment of damages. This court will not allow under any circumstances for the courts to be used as a tool for a public body to find redress for its own purported mistake. Based on the overwhelming evidence the F plaintiff knew from the very beginning what they had done in approving the third application and granting the approval of the building plan.

[99] After hearing respective learned counsel and upon due consideration of their oral submissions, written submissions and the records of appeal, the G learned judge had fallen into error in principle which merits setting right by this court. We take the view that the learned JC erred by allowing the claim and dismissing the counterclaim.

H **[100]** We are of the unanimous view that the appeal be allowed with costs. The High Court Order is set aside. Consequently, the defendant's appeal on the dismissal of its counterclaim in particular prayers (1), (2) and (3) is allowed with costs. The matter is remitted to the High Court for the assessment of damages. Costs of RM150,000 here and below subject to payment of allocator. I Deposit to be refunded.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor